ORAL ARGUMENT NOT YET SCHEDULED

Nos. 15-1203 and 15-1235

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SCHWARZ PARTNERS PACKAGING, LLC D/B/A MAXPAK,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL & SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC,
Intervenor.

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
CASE NUMBER 12-CA-109207

PETITIONER SCHWARZ PARTNERS PACKAGING'S REPLY BRIEF

Kerry P. Hastings
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
Phone: (513) 381-2838

Counsel for Petitioner Schwarz Partners Packaging, LLC

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[1] Authorities on which we chiefly rely are marked with asterisks.

GLOSSARY

"Act" means National Labor Relations Act.

"Board" means National Labor Relations Board.

"Board Br." means the Board's brief to this Court.

"Decision" means the Board's August 29, 2012 Decision setting aside the first election.

"MaxPak" means Schwarz Partners Packaging, LLC d/b/a MaxPak

"MaxPak Br." means MaxPak's opening brief to this Court.

"NLRA" means the National Labor Relations Act

"Order" means the National Labor Relations Board's June 26, 2015 in Schwarz Partners Packaging, LLC d/b/a MaxPak, 362 NLRB No. 138 (2015).

"Union" means Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO, CLC.

"Union Br." means the Union's brief to this Court.

STATUTES AND REGULATIONS

The applicable statutes and regulations are set forth in MaxPak's opening brief and the Board's brief.

SUMMARY OF ARGUMENT

It is undisputed that: (1) the Board lacked a quorum when it issued its August 29, 2012 Decision setting aside the Union's defeat in the first election and ordering a second election; and (2) the Decision was therefore void under controlling authority from this Court. Noel Canning v. NLRB, 705 F.3d 490, 514 (D.C. Cir. 2013) ("The Board had no quorum, and its order is void."), aff'd on other grounds, 134 S. Ct. 2550 (2014).

As MaxPak explained in its opening brief (MaxPak Br. at 9), these two undisputed facts are sufficient for MaxPak to win this case. As the Decision was void, the Union's defeat in the first election was never set aside. The second election was never directed and the certification that MaxPak now challenges never occurred. MaxPak cannot waive objections to a certification that never existed. Neither the Board nor the Union has any answer to this dispositive point.

In addition, this Court's decisions in UC Health v. NLRB, 803 F.3d 669, 672-73 (D.C. Cir. 2015) and SSC Mystic Operating Co., LLC v. NLRB, 801 F.3d 302, 308 (D.C. Cir. 2015), require the conclusion that MaxPak's quorum challenge is non-waivable. The employers in these cases (as well as the employer in Noel

Canning) would have waived their quorum-based challenge to Board action by failing to raise the issue before the Board at the proper time. But this Court, relying on the unique nature of the quorum issue, found no waiver in all three cases. There is no logical basis to distinguish between a waiver based on failing to raise the issue before the Board and a waiver based on bargaining three times prior to this Court's Noel Canning decision. A waiver is a waiver. Accordingly, the Board's efforts to prove that an employer ordinarily waives objections to a certification by bargaining with a union miss the mark because none of the cases the Board cited for that conclusion involve a quorum-based challenge to the certification.

The argument that MaxPak explicitly accepted Board action without a quorum in this case is without merit. To be sure, MaxPak raised the quorum issue in the representation case. But at the time MaxPak bargained three times with the Union, MaxPak could not have known with any certainty that the Board in fact lacked a quorum because no court, much less the Supreme Court, had so found. This Court in UC Health stated that it would not penalize employers like MaxPak for not anticipating the Supreme Court's decision resolving the quorum issue. UC Health, 803 F.3d at 673. And that is exactly what this Court would be doing if it accepted the Board's waiver argument.

The quorum issue is jurisdictional in any event because it goes to the Board's power to act. This Court strongly suggested that is so in its Noel Canning decision and the Third Circuit has reached that conclusion. Just as a party cannot waive an objection to subject matter jurisdiction regardless of the party's actions, MaxPak cannot waive its objection to Board action without a quorum.

The Board offered no defense on the "merits." So MaxPak's petition for review should be granted after the Board's waiver argument is rejected.

ARGUMENT

A. The Quorum Issue Is Properly Before This Court.

The quorum issue is properly before the Court for the following independently sufficient reasons.

1. MaxPak cannot waive objections to void Board action.

It is undisputed that the Board lacked a quorum when it issued its Decision. Accordingly, this constitutes an "extraordinary circumstance" defeating any potential waiver and the Decision was void under this Court's Noel Canning decision. Noel Canning v. NLRB, 705 F.3d 490, 514 (D.C. Cir. 2013) ("The Board had no quorum, and its order is void."), aff'd on other grounds, 134 S. Ct. 2550 (2014).

The undisputed fact that the Decision was void requires the following conclusions: (1) the first election was never set aside; (2) the second election was never directed; (3) the second election never occurred; and (4) the certification

never issued. The first election is the only valid action in this case. And the Union lost that election.

Neither the Board nor the Union disputed these conclusions or offered any argument as to why the fact that the Decision was void independently defeats any waiver argument. Because MaxPak cannot waive objections to a certification that never existed, the Board's waiver argument must be rejected for this reason alone.

2. The quorum issue cannot be waived under this Court's controlling decisions.

Even assuming the fact that the Decision is void is not decisive, this Court has rejected waiver arguments directed at the quorum issue on three occasions. Noel Canning v. NLRB, 705 F.3d 490, 496-98 (D.C. Cir. 2013), aff'd on other grounds, 134 S. Ct. 2550 (2014); UC Health v. NLRB, 803 F.3d 669, 672-73 (D.C. Cir. 2015); SSC Mystic Operating Co., LLC v. NLRB, 801 F.3d 302, 308 (D.C. Cir. 2015).

In every one of these cases, the employers would have waived the quorum issue under settled law. In Noel Canning, the employer never raised the quorum issue before the Board in the unfair labor practice case. Noel Canning, 705 F.3d at 496. In UC Health and SSC Mystic, the employers never raised the quorum issue before the Board in the representation case. UC Health, 803 F.3d at 672; SSC Mystic, 801 F.3d at 308. If the quorum issue could be waived at all, these three employers would have waived it.

There is no basis to distinguish between the alleged waivers in these three cases and the alleged waiver in MaxPak's case. A waiver is a waiver. The quorum issue's unique nature defeats all waiver arguments, not just some and not others. The distinction offered by the Board's brief (a distinction not asserted by the Board's decision in the unfair labor practice case) between MaxPak's bargaining on three occasions and the employers' total failure to raise the issue in the above cases makes no difference.

As this Court's controlling precedents establish that the quorum issue cannot be waived, the Board's waiver argument should be rejected.

3. MaxPak did not waive the quorum issue.

Even assuming the quorum issue could be waived, MaxPak did not waive the issue here. The Board's argument that MaxPak "explicitly accepted" Board action without a quorum by not objecting to the second election after MaxPak raised the quorum issue in the representation case and by bargaining with the Union on three occasions before this Court's Noel Canning decision is without merit.

The Board's "explicit acceptance" argument (another argument not relied on by the Board in its decision in MaxPak's case) relies on the following sentence from UC Health: "Perhaps some objections to agency action could be abandoned by explicit acceptance of the agency's authority to act under the statute." UC

Health, 803 F.3d at 673. This sentence is dicta, as this Court stated immediately thereafter: "But we need not decide that here because UC Health did not expressly abandon anything at all in the Stipulated Election Agreement, and we will not hold it responsible for failing to preserve expressly an argument the substance of which had not yet arisen." Id. (citation omitted).

As MaxPak has explained above, an "explicit acceptance" exception does not make sense under this Court's precedents. A party cannot supply statutory authority for Board action where Congress did not authorize the Board to act. A party cannot accept a void act. And differentiating between waivers is not a sensible exercise. UC Health did not create such an exception and this Court should not recognize it here.

The Board's reliance on the fact that MaxPak raised the issue before the Board in the representation case is misplaced. Initially, this argument is ironic. If accepted, MaxPak would be worse off because it gave the Board a chance to get the quorum issue right (the main policy rationale behind the waiver doctrine) than the Noel Canning, UC Health, and SSC Mystic employers who never properly raised the issue before the Board. The Court should reject this perverse argument for this reason alone. Furthermore, as the Board demonstrated in its brief (Board Br. at 15 n.3), the basis for the quorum challenge had existed for many years and MaxPak (as well as the employers in the other three cases) would have been

charged with constructive knowledge of the law in any event. The employer in UC Health both stipulated to the election in that case and failed to file any objections **after** this Court issued its Noel Canning decision. MaxPak did not even have the benefit of this Court's Noel Canning decision when it bargained with the Union on three occasions in early January 2013.

Even if an "explicit acceptance" exception existed, UC Health requires the conclusion that MaxPak did not explicitly accept Board action without a quorum. This Court stated:

> And for that matter, UC Health could not have known with any certainty that the Board had no quorum even without Senate approval for the President's appointments until the Supreme Court handed down its decision in *Noel Canning* fourteen months after the election. We will not hold UC Health responsible for failing to see the future.

UC Health, 803 F.3d at 673.

The same is true here. Exactly as in UC Health, MaxPak's actions that supposedly waived its right to challenge void Board action occurred well before the Supreme Court's Noel Canning decision. In fact, the case for waiver is weaker in MaxPak's case because its actions also occurred **before** this Court's Noel Canning decision where the UC Health employer's actions occurred **after** this Court's Noel Canning decision. As in UC Health, MaxPak could not have known "with any certainty" that the Board lacked a quorum at the relevant time, which

conclusively precludes any "explicit acceptance" of Board action taken without a quorum. To find a waiver here would "hold MaxPak responsible for failing to see the future," which UC Health forbids.

If the Court entertains the "explicit acceptance" argument (which it should not), UC Health makes the Supreme Court's Noel Canning decision the critical date after which "explicit acceptance" could potentially occur. As MaxPak's actions that allegedly caused a waiver occurred before that date, MaxPak could not have "explicitly accepted" Board action without a quorum. The waiver argument should be rejected for this reason as well.

4. The quorum issue is jurisdictional.

The quorum issue is jurisdictional. MaxPak's opening brief explained why, although this Court has never squarely held that the issue is jurisdictional, the analysis from this Court's Noel Canning decision in addition to Noel Canning's holding that Board action taken without a quorum is void supports that conclusion. (MaxPak Br. at 7-8) In its response, the Board observed that other circuits have found the constitutional issue underlying MaxPak's quorum challenge non-jurisdictional. (Board Br. at 17-18)

The Board is correct that other circuits have found the constitutional issue underlying MaxPak's quorum challenge non-jurisdictional, but those decisions are not binding here. The Board again failed to acknowledge the implications of this

Court's decision that Board actions taken without a quorum are void, which strongly suggests that this issue is jurisdictional because it is impossible to acquiesce to an action which never occurred in the first place.

And the Third Circuit's reasoning in NLRB v. New Vista Nursing and Rehabilitation, 719 F.3d 203, 213 (3d Cir. 2013), reh'g granted (August 11, 2014), that the quorum issue itself is jurisdictional which makes otherwise non-jurisdictional challenges jurisdictional is persuasive in this unique context. Congress did not authorize any Board action in the absence of three members. Exactly like subject matter jurisdiction in a federal court, the actions or inactions of the parties cannot supply authority for the Board to act where Congress has not authorized Board action. The quorum issue does not involve whether the Board "got it right" (a "merits" issue where waivers are generally appropriate). The quorum issue instead challenges the Board's power to act at all (rightly or wrongly). That is a jurisdictional inquiry. The Board offered no contrary analysis.

As it is undisputed that a jurisdictional issue cannot be waived, the Board's waiver argument should be rejected for this reason as well.

B. The Petition For Review Should Be Granted On The Merits.

The Board did not dispute that once its waiver argument is rejected, the petition for review should be granted. The Board had no authority to set aside the first election (which the Union lost) or to direct a second election due to the

Board's lack of a quorum. The Union's certification never occurred. Accordingly, MaxPak had no duty to bargain with the Union. The complaint should have been dismissed.

CONCLUSION

For each and all of the foregoing reasons and for those stated in its opening brief, MaxPak respectfully requests that this Court grant MaxPak's petition for review and deny the Board's cross-application for enforcement.

Respectfully submitted,

/s/ Kerry P. Hastings
Kerry P. Hastings
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
Phone: (513) 381-2838
Fax: (513) 381-0205
E-mail: hastings@taftlaw.com

Attorney for Petitioner Schwarz Partners Packaging, LLC

CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(C), MaxPak certifies that this reply brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume limitation because the brief contains 2,199 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), and uses proportionally-spaced, 14-point Times New Roman font.

Respectfully submitted,

/s/ Kerry P. Hastings
Kerry P. Hastings
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
Phone: (513) 381-2838
Fax: (513) 381-0205
E-mail: hastings@taftlaw.com

Attorney for Petitioner Schwarz Partners Packaging, LLC

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petitioner's Reply Brief was electronically filed with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit on February 25, 2016 using the appellate CM/ECF system, which will serve Linda Dreeben, Kira Dellinger Vol, and Jared D. Cantor, counsel for Respondent National Labor Relations Board, and Daniel M. Kovalik, counsel for Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, by CM/ECF.

A copy of the foregoing Petitioner's Reply Brief was also served on Jared D. Cantor, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, and Daniel M. Kovalik, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO/CLC, 60 Boulevard of the Allies, Suite 807, Pittsburgh, PA 15222 via regular United States mail, postage pre-paid, on February 25, 2016.

/s/ Kerry P. Hastings
Kerry P. Hastings
Taft Stettinius & Hollister LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
Phone: (513) 381-2838
Fax: (513) 381-0205
E-mail: hastings@taftlaw.com

Attorney for Petitioner Schwarz Partners Packaging, LLC